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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 412

ANGELO INCISO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Now comes Angelo Inciso, petitioner herein, by his attorneys, under and pursuant to this Court's Rule 24(4), and replies to the Brief for the United States in Opposition, as follows.

Mindful that at this stage our petition for writ of certiorari has as its prime purpose exhibiting substantial reasons for granting the writ, we confine this Reply to a showing of some critical deficiencies in the Government's Brief.

This is a singular case. And the Government by failing to find or cite any relevant decisions governing all the questions raised by Petitioner establishes the urgent need for review by this Court.

QUESTIONS PRESENTED.

Government's Brief pp. 1-2.

We stand on our "Questions Presented" (Petition, 2 to 6) and point out the Government has presented only a truncated version of the serious questions involved. Accordingly, we disagree that the Government's "Questions" fairly represent the points involved.

REPLY TO ARGUMENTS OF THE GOVERNMENT.

Par. 2 Government Brief, pp. 10 to 12.

Inciso, petitioner here, testified before the Senate subcommittee on December 5, 1955, and probably again on the next day [Appellant's Appendix 232; T.R. 809]. The indictment [Appellant's Appendix 6, or see Appendix to Petition at page 3a] shows counts charging violations some days *after* that purported testimony was heard and taken. Plainly testimony given *before* some of the days charged in the indictment has no bearing whatever on transactions allegedly taking place subsequent to the purported testimony. We think on that aspect the Government is urging a sort of anticipatory exculpation. In any event, the purported Senate testimony was smuggled into the District Court trial under a pseudo theory of a false exculpatory statement only for conversion into a vehicle for creating a presumption against Inciso. See, e.g., 18 U.S.C.A. § 3481. Since Inciso refrained from taking the witness stand during his trial below his credibility was not put in issue, and all comments that he was a "liar" were improper and highly prejudicial. The purported Senate testimony had no legitimate relevancy at the trial below.

In its Opinion the Seventh Circuit acknowledges, as we contended in that Court of Appeals, that: "It is true that *none* of the employers named in the indictment were men-

tioned by name in the Senate testimony. . . ." (Appendix to Petition, p. 9a. Italics supplied).

On page 11 of the Government Brief the Court is informed that the ultimate defense objection made to the admission of the purported Senate testimony was that "'proper foundation' had not been laid." Continuing on page 11 the Government states: "Had the objection been seasonably made that the employers referred to by petitioner when he was testifying before the committee had not been identified an effort could have been made to identify them at the trial." (Govt. Brief, p. 11). This contention, or perhaps excuse, rests upon the Government's misconception of trial tactics, and the law of evidence. Of course there is no legalistic reason why the defense must educate the prosecutors by pointing up their failure to tie in employers named in the indictment with those, if any, mentioned during Inciso's testimony before the Senate sub-committee. And the lack of foundation is manifested by utterly failing in identifying any employers named in the indictment as being one and the same as those, if any, about whom Inciso was testifying before the Senate committee. The Government has cut ground from under its own argument.

Again, on page 11 of its Brief, the Government, still speaking about the employers, states: "In any event, the record indicates that they included the same employers who made the payments involved in this case." We respectfully ask the Court to evaluate that bold assertion with the Seventh Circuit's statement already quoted above: "It is *true* that *none* of the employers named in the indictment were mentioned by name in the Senate testimony." (Appendix, Petition at Page 9a, Italics ours.)

If your Honors will read pages 13 to and including 21 of our Petition it will be apparent from the face of the Senate testimony, which we have reprinted as read to the trial jury, *that no employers are named* in it. We say the Government, by its approach here, has now demonstrated sound reasons for allowance of the writ.

How trial jurors could determine whether the so-called exculpatory statement was false without knowing the employers mentioned in it should be difficult for the Government to explain. Yet it blithely bridges, simply ignoring that inconvenient fact, from a fallacious premise to an unfounded conclusion. The Government's argument under paragraph 2 is fatally defective for want of named employers in the purported Senate testimony.

Any cutting edge seemingly possessed by *Yee Hem* v. *United States*, 268 U.S. 178 (1925), relied on by the Government in its Brief at page 13, is dulled by carefully reading that opinion. *Yee Hem* pivots on a statutory presumption, penalizing possession of opium, created by the Congress in its effort to control that drug. While this Court approved that particular statutory presumption, its use as analogy in the situation now before the Court is wholly unsound and unpersuasive. It must be recalled that *Yee Hem* was decided under an Act of Congress prohibiting importation of opium except under Treasury regulations, which, in turn, prohibited importation of smoking opium. The statute there in issue made it an offense knowingly to conceal opium illegally imported, and cast upon a defendant found in possession of smoking opium the burden of showing that he had not acquired it through illegal importation. The statutory presumption was sustained on the theory that no lawful purchase of smoking opium could occur in this country. Accordingly, such possession gave rise to "sinister implications." Mr.

Justice Sutherland, speaking for the Court in the *Yee Hem* case, concluded it was not unreasonable to create such a presumption of unlawful importation as the source of smoking opium the possession of which a defendant concealed. What we have just stated is taken, in part, from the majority opinion reported as *Tot* v. *United States*, 319 U.S. 463, 469 (1943), where Mr. Justice Roberts pointed out, *inter alia:*

> "Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.
>
> "Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision." (Footnote references omitted.)

This Court is now confronted with an abortive attempt by the Government to equate (Brief 12-13) a statutory presumption arising out of possession, with a clear invasion of petitioner's constitutional rights coupled with violation of statutory protection accorded him under 18 U.S.C.A. §3481.

Par. 3 Government Brief, pp. 13-14.

At this point the Government apparently declines to answer our contentions predicated upon the "trust fund" provision in the Statute discussed in our Petition.

We urged the (Petition, pp. 33 to 35) disparity in sentencing this defendant-petitioner, and the Government has left our particular contentions unanswered.

Par. 4 Government Brief, p. 14.

At the time the indictment, involved at bar, was returned § 302(b) of the Labor Management Relations Act of 1947 was aimed at "representatives" of employees. This indictment does not charge Inciso as such a "representative." Significantly the language of § 302, of the Act, was drastically changed (73 Stat. 537), and now provides, *inter alia*: "(b)(1) It shall be unlawful for *any person* to request, demand, receive, or accept, or to agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section." (Italics supplied).

• • •

Having omitted all reference or answer to our Question 9 (Petition, pp. 4-5; 36 to 38) concerning defense instructions refused by the trial judge, the Government concedes its substance, vitality, and importance.

CONCLUSION.

For all of the matters and reasons heretofore stated in our Petition and now implemented by this Reply, together with the patent deficiencies readily apparent in the Brief in Opposition, it is respectfully submitted that the petition for certiorari should be granted and review allowed.

Respectfully submitted,

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